

**People's United Bank, N.A. v Sampson Bus.
Solutions LLC**

2016 NY Slip Op 30497(U)

March 9, 2016

Supreme Court, Suffolk County

Docket Number: 15-17078

Judge: Joseph A. Santorelli

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 1-14-16
SUBMIT DATE 3-3-16
Mot. Seq. # 01 - MG
X-Mot. Seq. # 02- MD

-----X
PEOPLE'S UNITED BANK, N.A.,

Plaintiff,

JEFFREY B. HULSE, ESQ.
Attys. for Plaintiff
295 NORTH COUNTRY RD
SOUND BEACH, NY 11789

-against-

SAMPSON BUSINESS SOLUTIONS LLC and
HENRY J. FIORILLO,

Defendants.

THE MURRAY LAW GROUP, PC
Atty. for Defendants
132 CLYDE ST, STE 1
WEST SAYVILLE, NY 11796

-----X
Upon the following papers numbered 1 to 51 read on this motion for summary judgment & to dismiss and disqualify attorney; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; Notice of Cross Motion and supporting papers 14 - 34; Answering Affidavits and supporting papers 35 - 42; Replying Affidavits and supporting papers 43 - 51; Other ; (and after hearing counsel in support and opposed to the motion) it is,

The plaintiff moves pursuant to CPLR 3212 for an order granting summary judgment in its favor. The defendants oppose this application and cross move for an order: (1) disqualifying the plaintiff's attorney, Jeffrey B. Hulse, Esq., from continuing his representation of the plaintiff in this matter; and (2) dismissing the complaint of plaintiff pursuant to CPLR 3211 (a) (1) and (7). Plaintiff opposes the cross motion in all respects.

In support of the motion, plaintiff has submitted, inter alia, an attorney's affirmation; an affidavit in support from Robert Staron; copies of the promissory note; copies of a printout on prime rate; copies of the commercial guaranty; copies of the business loan agreement; copies of a letter dated September 21, 2015; copies of the summons and verified complaint; copies of the answer; copies of the amended answer; and copies of a letter dated September 24, 2015. In opposition to the motion and support of the cross motion, defendants have submitted, inter alia, an attorney's affirmation; an affidavit of Henry J. Fiorillo; copies of a printout; copies of a forbearance agreement; copies of a check dated September 1, 2105; and copies of a letter dated September 24, 2015.

Motion to Disqualify Attorney

It is well settled that a party is entitled to be represented by the attorney of his or her choice. This is a valued right which should not be abridged absent a clear showing that disqualification is warranted. (See *S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.*, 69 NY2d 437). However, this right is not absolute. (See *Matter of Abrams (John Anonymous)*, 62 NY2d 183). The disqualification of an attorney is a matter that rests within the sound discretion of the Court. (See *Columbus Constr. Co., Inc. v Petrillo*

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Bldrs. Supply Corp., 20 AD3d 383; *Nationwide Assoc. v Targee St. Internal Medicine Group*, 303AD2d 728; *Galanos v Galanos*, 20 AD3d 450; *Wall St. Assoc. v Brodsky*, 227 AD2d 301).

The defendants cross move this court for an order disqualifying the plaintiff's attorneys, the Law Offices of Jeffrey B. Hulse, from continuing their representation of the plaintiff based upon the Advocate-Witness Rule. Defendants aver that plaintiff's attorney, Jeffrey B. Hulse, Esq., "is a material witness in respect to a significant issue of fact in regards to the litigation of this matter... Mr. Hulse was involved in the negotiations of the Forbearance Agreement between the parties, Mr. Hulse drafted the Forbearance Agreement, and Mr. Hulse demanded payment for the preparation of the Forbearance Agreement."

To prove an appearance of impropriety, the burden is on the movant to come forward with competent proof and a reasonable basis to demonstrate that some specifically identifiable confidential information has been disclosed. (See *Unger v. Unger*, 15 AD3d 389; *Martin v. Martin*, 224 AD2d 597).

The facts of this matter show that there were no confidences exchanged between Mr. Hulse and the defendants. The defendant, Henry Fiorillo, claims that he was engaged in email negotiations with a Ms. Hall and that she advised him that "an attorney would be responsible for preparing the Forbearance Agreement." He also claims that he received an email from Mr. Hulse advising him to "1) execute and return two (2) copies of the agreement; 2) send a check in the sum of \$151.74 payable to the Plaintiff for accrued interest; and 3) send a check payable to Mr. Hulse for preparation of the Forbearance Agreement." Defendant alleges several other email communications, between June 12, 2015 and September 2015, with Ms. Hall wherein there was discussions about interest and late charges. Defendant claims that he overnight mailed the Forbearance Agreement along with a check made payable to Mr. Hulse on September 1, 2015, but did not include the check for the accrued interest because they were still had not established "the correct interest fee during ongoing discussions/communications with Ms. Hall regarding same." Based upon the defendant's own claims as to the ongoing communications and discussions with Ms. Hall, he has failed to come forward with competent proof or a reasonable basis for this Court to disqualify Mr. Hulse. Accordingly, the application to disqualify the Law Offices of Jeffrey B. Hulse is denied.

Motion to Dismiss

To succeed on a motion to dismiss pursuant to CPLR 3211 for failure to state a cause of action, the court must determine whether, accepting as true the factual averments of the complaint and granting plaintiffs every favorable inference which may be drawn from the pleading, plaintiffs can succeed upon any reasonable view of the facts stated (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 754 NE2d 184, 729 NYS2d 425 [2001]; see also *Fowler, Rodriguez, Kingsmill, Flint, Gray & Chalos LLP v Island Prop., LLC*, 307 AD2d 953, 763 NYS2d 481 [2d Dept 2003], *Bartlett v Konner*, 228 AD2d 532, 644 NYS2d 550 [2d Dept 1996]). If the pleading states a cause of action and if, from its four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion for dismissal will fail (see *Wayne S. v County of Nassau Dept. of Social Services*, 83 AD2d 628, 441 NYS2d 536 [2d Dept 1981]). The documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (see *Estate of Menon v*

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Menon, 303 AD2d 622, 756 NYS2d 639 [2d Dept 2003], citing *Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511, *Roth v Goldman*, 254 AD2d 405, 406, 679 NYS2d 92).

In the context of a CPLR 3211 motion to dismiss, the Court must take the factual allegations of the complaint as true, consider the affidavits submitted on the motion only for the limited purpose of determining whether the plaintiff has stated a claim, and in the absence of proof that an alleged material fact is untrue or beyond significant dispute, the Court must not dismiss the complaint (*Wall Street Assocs. v Brodsky*, 257 AD2d 526, 684 NYS2d 244 [1st Dept 1999], citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634-636). In making a determination whether the complaint sets forth a cognizable claim, evidentiary material may be considered to “remedy defects in the complaint” (see *Dana v Shopping Time Corp.*, 76 AD3d 992, 908 NYS2d 114 [2d Dept 2010], quoting *Rovello v Orofino Realty Co.*, *supra* at 40 NY2d at 636).

Defendants have provided documentary proof that they signed and delivered a Forbearance Agreement which on its face required the defendants to pay “\$151.74 on or before August 10, 2015 to be applied to accrued interest” and “\$194.21 per month commencing on September 1, 2015.” The agreement further states that the “Lender would not enter into this Agreement but for the payments and covenants of the Borrower provided for by this Agreement.” The defendants concede that the only payment sent to the plaintiff with the Forbearance Agreement was for \$750.00 made payable to the plaintiff’s attorney as payment for the drafting of the Forbearance Agreement. Further, defendants concede that they did not send a payment for accrued interest because Mr. Fiorillo and Ms. Hall were still in discussions as to what the correct interest due amount was. Finally, defendants concede that the check sent to Mr. Hulse was returned with a letter indicating that the check for payment of the preparation fees was being returned “[s]ince you have failed to comply with all other directives, including payment of additional monies.” These concessions by the defendants show that the plaintiff and defendant did not enter into a Forbearance Agreement on September 1, 2015.

The Court concludes that, accepting as true the factual averments of the complaint and granting plaintiff every favorable inference which may be drawn from the pleading, the plaintiff has pled a cause of action cognizable at law as against the defendants. Therefore the defendants’ motion to dismiss is denied in all respects.

Motion for Summary Judgment

CPLR §3212(b) states that a motion for summary judgment “shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission.” If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (*Olan v. Farrell Lines, Inc.*, 105 AD 2d 653, 481 NYS 2d 370 (1st Dept., 1984; aff’d 64 NY 2d 1092, 489 NYS 2d 884 (1985); *Spearman v. Times Square Stores Corp.*, 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-Miller, *New York Civil Practice Sec.* 3212.09)).

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The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" CPLR3212 [b]; *Gilbert Frank Corp. v Federal Insurance Co.*, 70 NY2d 966, 525 NYS2d 793, 520 NE2d 512 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]). Furthermore, the evidence submitted in connection with a motion for summary judgment should be viewed in the light most favorable to the party opposing the motion (*Robinson v Strong Memorial Hospital*, 98 AD2d 976, 470 NYS2d 239 [4th Dept 1983]).

On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue (see *S.J. Capelin Associates v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [1974]). However, the court must also determine whether the factual issues presented are genuine or unsubstantiated (*Prunty v Keltie's Bum Steer*, 163 AD2d 595, 559 NYS2d 354 [2d Dept 1990]). If the issue claimed to exist is not genuine but is feigned and there is nothing to be tried, then summary judgment should be granted (*Prunty v Keltie's Bum Steer*, *supra*, citing *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 239 NE2d 725 [1968]; *Columbus Trust Co. v Campolo*, 110 AD2d 616, 487 NYS2d 105 [2d Dept 1985], *affd*, 66 NY2d 701, 496 NYS2d 425, 487 NE2d 282).

The plaintiff commenced this action to recover money due and owing under a promissory note and commercial guaranty. The plaintiff claims that defendants did not pay \$13,741.79 under that promissory note. The promissory note was executed on August 2, 2013 in the original amount of \$15,000.00. The note required the defendants to make monthly payments commencing on September 2, 2013. Defendant Henry Fiorillo signed a personal guaranty for the promissory note. The defendants defaulted in making the monthly payments due on July 2, 2015 and all payments after that. On September 21, 2015 the plaintiff declared the entire balance due and demanded payment. The defendant, Henry Fiorillo, acknowledges that he signed a personal guaranty and that he was subsequently unable to make the payments pursuant to the note.

Based upon a review of the motion papers the Court concludes that the plaintiff has made a prima facie showing of its entitlement to judgment as a matter of law. In opposition to this prima facie showing and viewing the evidence in the light most favorable to the defendants, the defendants have failed to meet their burden of raising a triable issue of fact. It is

ORDERED that this motion by plaintiff, People's United Bank, N.A., for an order granting summary judgment in its favor against defendants, Sampson Business Solutions LLC and Henry J. Fiorillo, is granted on the ground that no triable issues exist in this action to recover on a promissory note, and the plaintiff shall have judgment against defendants in the amount of \$13,741.79, plus interest at the rate of 10.750% per annum from July 2, 2015, together with reasonable attorney's fees and costs and disbursements (see

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Northport Car Wash, Inc. v Northport Car Care, LLC, 52 AD3d 794, 859 NYS2d 378 [2d Dept 2008];
Davis v Lanteri, 307 AD2d 947, 763 NYS2d 470 [2d Dept 2003]); and it is further

ORDERED that counsel for the plaintiff shall submit a proposed judgment to the Court on notice on or before **May 6, 2016**; and it is further

ORDERED that a copy of this order shall be served by plaintiff: 1) on the defendants by certified mail, return receipt requested and by regular mail on or before April 1, 2016; and 2) on the Clerk with affidavit(s) of service on or before April 8, 2016.

The foregoing constitutes the decision and Order of this Court.

Dated: March 9, 2016



HON. JOSEPH A. SANTORELLI
J.S.C.